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THE BALLER HERBST LAW GROUP

A PROFESSIONAL CORPORATION
2014 P STREET, N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 833-5300
FAX: (202) 833-1180
www.baller.com

JAMES BALLER
TELEPHONE: (202) 833-1144
PORTABLE: (202) 441-3663
INTERNET: Jim@Baller.com

MINNEAPOLIS OFFICE
377N GRAIN EXCHANGE BUILDING
301 FOURTH STREET SOUTH
MINNEAPOLIS, MN 55415
(612) 339-2026

June 1, 2009

By Hand Delivery

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

ORIGINAL

FILED/ACCEPTED
JUN - 1 2009
Federal Communications Commission
Office of the Secretary

c/o Natek, Inc.
236 Massachusetts Avenue, NE
Suite 110
Washington, DC 20002

Re: Ex Parte Communication
Lafayette Utilities System Petition for Waiver
Dkt Nos. CSR-8152-Z and 97-80

Dear Ms. Dortch:

On May 26, 2009, Lafayette Utilities System (LUS) filed amended reply comments in this matter, primarily to correct a factual error in the reply comments that it had filed on May 22, 2009. Unfortunately, some of the amended language was itself incorrect. To set the record straight, LUS requests that you accept for filing the original and four copies of LUS's attached further amended reply comments. LUS apologizes to all concerned for this inconvenience.

The attached comments amend the first full paragraph on page 2 and delete the last paragraph on page 8 of the filing of May 26. These changes are intended to remove the suggestion that LUS's system is "all-digital" up to the optical network terminal at the subscriber's home. They clarify that, for subscribers who require a lower cost option than all-digital Internet Protocol Television, LUS also makes its basic and expanded basic video programming available in analog form, by converting the digital programming into analog format at the head end and transporting it in its own light frequency to the customer's premises.

As explained in LUS's opening Petition for Waiver, the analog features of LUS's system are fully compliant with the Commission's integration ban and are not at issue in this proceeding. LUS is requesting a waiver only for its all-digital IPTV service, for which there is currently no commercially available technology that would allow LUS to comply with the ban.

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Again, we apologize for the inconvenience. Please return a time-stamped copy to the messenger.

Sincerely,

James Baller

cc: All Counsel of Record

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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Federal Communications Commission
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In the Matter of	)	
	)	
Petition of Lafayette City-Parish Consolidated Government of Lafayette, Louisiana, d/b/a Lafayette Utilities System, for Waiver of Section 76.1204(a) of the Commission's Rules	)	**CSR-8152Z**
	)	**CS Docket No. 97-80**
Implementation of Section 304 of the Telecommunications Act of 1996	)	
	)	
Commercial Availability of Navigation Devices	)	

FURTHER AMENDED REPLY COMMENTS OF PETITIONER LAFAYETTE UTILITIES SYSTEM

The City-Parish Consolidated Government of Lafayette, Louisiana, acting through its utilities department, the Lafayette Utilities System ("LUS") has petitioned the Commission for a waiver of Section 76.1204(a) of the Commission's rules, which prohibits multichannel video programming distributors (MVPDs) from offering navigation devices that integrate navigation functions with security and conditional access functions (the "integration ban"). LUS requested the waiver because it uses advanced Internet Protocol Television (IPTV) technology for which no commercially available navigation device currently on the market would enable LUS to comply with Section 1204(a).

Pursuant to Section 76.7 of the Commission's rules, LUS now submits the following responses to the comments filed by Cox Communications Louisiana, LLC D/B/A Cox

Communications Greater Louisiana ("Cox") and the Consumer Electronics Association ("CEA").

I. INTRODUCTION

As explained in detail in LUS's petition, LUS is deploying a $110 million state-of-the-art fiber-to-the-home (FTTH) system serving more than 57,000 homes, schools, businesses and institutions throughout the city. In January 2009, LUS launched a multichannel video programming service over this system, designed from the ground up to operate on LUS's advanced FTTH network. The LUS IPTV video service – offered in direct competition to Cox Communications' cable service in Lafayette – includes a full lineup of basic, expanded basic, and premium programming in digital form through LUS's advanced FTTH system. For subscribers who require a lower cost option, LUS also makes its basic and expanded basic video programming available in analog form, by converting the digital programming into analog format at the head end and transporting it in its own light frequency to the customer's premises.

LUS bases its request on both the Commission's general waiver authority in Sections 1.3 and 76.7 of the Commission's rules and the more specific statutory waiver authority in Section 629(c) of the Communications Act, 47 U.S.C. § 549. Under the latter, the Commission may grant a waiver of its regulations implementing Section 629(a) "when doing so is necessary to assist the development or introduction of new or improved services."[1]

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1 *See In the Matter of Bend Cable Communications, LLC, D/B/A. BendBroadband, Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules,* DA 07-47, rel. January 10, 2007, at ¶ 2.

On June 29, 2007, the Commission relied on its general authority to grant 130 MVPDs a waiver from Section 1204(a), to expire on December 31, 2009.[2] By subsequent *erratum*, the Commission eliminated the expiration date of December 31, 2009.[3] For certain providers using integrated HD or DVR set-top boxes, the Commission granted waivers ending July 1, 2008. In March 2008, the Commission issued another set of waivers without an expiration date for an additional set of MVPDs, including several which sought waivers for planned or active IPTV services.[4]

By its present petition, LUS requests a waiver similar to those which the Commission has already issued for similarly-situated IPTV system operators. While the Commission's prior orders included various complex considerations relating to the DTV transition and other matters (addressed in LUS's petition and below in response to Cox's comments), the issue in this case is simple and straightforward: LUS would sincerely like to comply with Section 1204(a), but having performed a diligent search, it has been unable to find commercially available navigation devices that would enable it to do so. In other cases in which this has been true, the Commission has granted the MVPDs in question waivers from its rules. LUS merely asks for similar treatment, until such time as commercially available devices are readily available.

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II. LUS REPLY TO COMMENTS OF COX COMMUNICATIONS

LUS is bringing potent new competition to Cox's video, broadband, and voice services in Lafayette. Not surprisingly, Cox seeks to thwart or delay this competition by urging the Commission to deny LUS a waiver. Cox's comments are flawed in several significant respects.

A. Cox Misstates the Scope of the Commission's Existing Waivers

According to Cox:

> The Commission's waivers were limited to systems that committed to providing an all-digital network and to 'HD and DVR devices with integrated security elements for use with Internet Protocol ("IP"), Asynchronous Transfer Mode ("ATM"), or hybrid QAM/IP systems.' The Commission's one-year IPTV waiver for integrated HD and DVR devices expired on July 1, 2008. . . . Since the Commission's advanced-capability IPTV waivers expired on July 1, 2008, other operators subject to the IPTV waiver, such as Verizon, brought their systems into compliance with the integration ban. To Cox's knowledge, no other IPTV operator now operates under a waiver of the integration ban. LUS should be treated no differently.[5]

Cox has apparently overlooked the distinction between the limited waivers that the Commission granted for integrated HD and DVR set-top boxes and the broader waivers that the Commission granted to IPTV providers such as LUS. The latter waivers were initially to expire at the end of 2009 and were, by subsequent *erratum*, given indefinite duration. That is the kind of waiver at issue here.

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know precisely how Verizon's system works or what it may be doing to comply with the ban – if it is indeed doing so.[6] But Verizon and LUS are in very different positions. Verizon, with its vastly larger subscriber base, may have been able to develop or obtain a proprietary device that works for its particular technology. LUS is simply too small to have that kind of clout in the commercial market. Cox has conspicuously failed to suggest a specific technology that is available to LUS, and LUS has not been able to find one.[7]

Accordingly, Cox's claim that "no IPTV operator now operates under a waiver of the integration ban" is misleading and, at best, unsupported.

B. Statutory Waiver Under Section 629(c): LUS Provides "New or Improved Programming or Services" For Which a Waiver is Necessary and Appropriate

LUS petitioned the Commission for a waiver from Section 1204(a) under the Commission's general waiver authority, as well as the statutory waiver authority granted to the Commission by Congress in Section 629(c).[8] In the *All-Digital Order* and subsequent *Consolidated Waiver Order*, the Commission chose to rely on its general waiver authority, rather than Section 629(c). Nevertheless, as fully set forth in LUS's petition, LUS believes that it meets the requirements of a Section 629(c) waiver, as well.

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8 47 U.S.C. § 549(c).

Under Section 629(c), the Commission "shall" issue a waiver from the integration ban "upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems ... that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products."[9]

According to Cox, the FCC may issue such a waiver only if the provider offers nothing other than digital service. Such a restrictive interpretation is clearly contrary to Congress' intent in enacting Section 629(c): "Congress...sought to avoid Commission actions 'which could have the effect of freezing or chilling the development of new technologies *and services*.' Under Section 629(c) [47 U.S.C. § 549] therefore, the Commission may grant a waiver of its regulations implementing Section 629(a) when doing so is necessary to assist the development or introduction of new or improved services."[10]

The Commission put a finer point on it in the *All-Digital Order,* in a statement with clear application to the situation at hand: Under Section 629(c), "waivers of [the integration ban] are granted when doing so 'is necessary to assist the development or introduction of a new or improved' service, such as, for example, a nascent MVPD offering from a new competitor." *All Digital Order,* ¶ 56.

9 *Id.*

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Based on the above statements, LUS should qualify for a waiver under Section 629(c). Not only is it a "nascent MVPD" and a "new competitor," but it is also providing a truly cutting-edge, "improved service" of tremendous benefit to the citizens of Lafayette.

Cox also suggests that LUS's petition should be denied outright because LUS did not specifically propose that the waiver it seeks be limited to a particular duration. (Cox, at 3). It is true that section 629(c) contemplates time-limited waivers. But the fact that LUS did not suggest a specific time limit for a 629(c) waiver (as opposed to a waiver under the Commission's general waiver authority, for which no time limit is statutorily required) should not foreclose the Commission's ability to grant one. The Commission presumably would base such a waiver on the absence of commercially available technologies that would enable the IPTV providers to comply with the integration ban. When that is no longer the case, the waiver would presumably expire automatically, or the Commission would issue an order to that effect. Thus, the waiver would not be of unlimited duration. If the Commission believes that a specific duration is required, LUS would not object to a reasonable expiration date, say the earlier of two years or the date upon which the FCC finds that viable technologies for IPTV providers are commercially available.

C. A Waiver Under the Commission's General Authority Also is Appropriate Under These Circumstances

As noted above, the Commission has heretofore relied mainly on its general waiver authority in granting waivers from Section 1204(a), and LUS based its petition in part upon the Commission's power to grant a waiver in the public interest "for good cause shown."[11] In the *All-Digital Order,* the Commission emphasized the value of enabling cable TV subscribers to receive all channels in digital format, and, through an interpretative lens based on the *Bend*

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[11] 47 CFR § 1.3.

Broadband proceeding, apparently required all waiver recipients to pledge to provide all-digital services by February 17, 2009.

Again, as explained in LUS's petition, it is not entirely clear whether the Commission intended to require waiver recipients to provide "only digital" services, or if, as stated in the *Bend Broadband Order*, the Commission simply wished to ensure that "cable subscribers will be able to view digital broadcast signals after the end of the DTV transition."[12] Cox insists that it is the former (Cox, at 3). If it is the latter, as seems more likely, LUS already satisfies the Commission's objective. As with an only-digital service, LUS customers may receive the full benefit of a complete digital channel lineup, including basic, expanded basic, and premium channels.[13] All subscribers to the service will be able to view digital broadcast signals after the end of the DTV transition. Based on the *Bend Broadband* statement above, LUS's service already satisfies the Commission's goal of encouraging digital service offerings.

In any event, LUS believes that the "all-digital" discussion, as well as other ancillary issues (such as whether a particular device is or is not a "low cost limited capability device")[14] serve only to distract from the fundamental issue: no technology currently on the market will enable LUS to comply with the integration ban. Congress could not have intended that the FCC derail state-of-the-art projects like Lafayette's by imposing standards that are

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12 *Bend Broadband Order*, 22 FCC Rcd at 217, ¶ 24.

13 LUS goes a step further, though, allowing customers to choose to receive basic and expanded basic service in analog format. Again, to be clear, LUS believes that its analog service is fully compliant with the integration ban, and only requests a waiver pertaining to its digital IPTV service.

14 As discussed in section III, LUS's reply comments to CEA, the debate over these and other topics indicate that a post-DTV-transition rulemaking on this subject may be beneficial.

technologically impossible to meet. For that simple reason alone, a waiver under the Commission's general waiver authority is appropriate.

D. Cox's Request for Waiver

Finally, Cox calls for the Commission to grant to it a waiver to the same extent that the Commission grants one to LUS. There are two problems with this. First, Cox's argument makes no sense. Cox claims that it is already complying with the integration ban. If that is true, then it presumably does not need a waiver, and there is no factual basis for the Commission to grant one.

Second, LUS and Cox use fundamentally different technologies. LUS provides service over a fiber-to-the-home infrastructure; Cox uses hybrid fiber coax. LUS uses IPTV; Cox does not. Commercial products are readily available to enable compliance by Cox's non-IPTV system; they are not available for LUS's IPTV service. LUS is a wholly new system and service; Cox has had the Lafayette market to itself for some time. Thus, each party's situation should be judged on its own merits.

III. RESPONSE TO COMMENTS OF CONSUMER ELECTRONICS ASSOCIATION

LUS now replies to the comments filed by the Consumer Electronics Association ("CEA"). To the best of LUS's knowledge, CEA has to this point opposed virtually all requests by MVPDs for waiver of the integration ban.[15] In response to LUS's petition, CEA called for the Commission to commence a rulemaking on issues relating to IPTV and Section 1204 of the Commission's rules.

LUS does not take issue with CEA's suggestion that a rulemaking may be appropriate in this circumstance. A fresh look at the matter could well be beneficial.

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15 *See All Digital Order; Consolidated Waiver Order.*

If the Commission chooses to initiate a rulemaking, it should nevertheless treat LUS like other IPTV providers and grant it a waiver now. If the rulemaking results in new regulatory requirements or IPTV providers, then the Commission should apply them uniformly to all IPTV providers, including LUS.

IV. CONCLUSION

For the foregoing reasons, and as more fully stated in its Petition, LUS requests that the Commission grant a waiver from the obligations set forth in Section 1204(a) of the Commission's rules, applicable to LUS's IPTV service.

Respectfully submitted,

Jim Baller
Casey Lide
THE BALLER HERBST LAW GROUP, P.C.
2014 P St. NW Suite 200
Washington, D.C. 20036
office: 202/833-5300
fax: 202/833-1180

June 1, 2009

Counsel for Petitioner

VERIFICATION

To the best of my knowledge, information and belief formed after reasonable inquiry, LUS's petition and these Reply Comments are well grounded in fact and are warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any Improper purpose.

CERTIFICATE OF SERVICE

I, James Baller, certify that on this 1st day of June, 2009, I caused a copy of the foregoing further amended reply comments to be served by U.S. mail, postage prepaid, upon the following counsel of record.

Jim Baller

Gary S. Lutzker
Derek Teslick
Dow Lohnes PLLC
1200 New Hampshire Avenue, NW
Washington, DC 20006

James W. Hedlund
Vice President for Regulatory Affairs
Consumer Electronics Association
1919 S. Eads St.
Arlington, VA 22202

Robert S. Schwartz
Mitchell L. Stoltz
Constantine Cannon LLC
1627 Eye Street, NW
10th Floor
Washington, DC 20006

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Broadband proceeding, apparently required all waiver recipients to pledge to provide all-digital services by February 17, 2009.

Again, as explained in LUS's petition, it is not entirely clear whether the Commission intended to require waiver recipients to provide "only digital" services, or if, as stated in the *Bend Broadband Order*, the Commission simply wished to ensure that "cable subscribers will be able to view digital broadcast signals after the end of the DTV transition."[12] Cox insists that it is the former (Cox, at 3). If it is the latter, as seems more likely, LUS already satisfies the Commission's objective. As with an only-digital service, LUS customers may receive the full benefit of a complete digital channel lineup, including basic, expanded basic, and premium channels.[13] All subscribers to the service will be able to view digital broadcast signals after the end of the DTV transition. Based on the *Bend Broadband* statement above, LUS's service already satisfies the Commission's goal of encouraging digital service offerings.

In any event, LUS believes that the "all-digital" discussion, as well as other ancillary issues (such as whether a particular device is or is not a "low cost limited capability device")[14] serve only to distract from the fundamental issue: no technology currently on the market will enable LUS to comply with the integration ban. Congress could not have intended that the FCC derail state-of-the-art projects like Lafayette's by imposing standards that are

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12 *Bend Broadband Order*, 22 FCC Rcd at 217, ¶ 24.

13 LUS goes a step further, though, allowing customers to choose to receive basic and expanded basic service in analog format. Again, to be clear, LUS believes that its analog service is fully compliant with the integration ban, and only requests a waiver pertaining to its digital IPTV service.

14 As discussed in section III, LUS's reply comments to CEA, the debate over these and other topics indicate that a post-DTV-transition rulemaking on this subject may be beneficial.

technologically impossible to meet. For that simple reason alone, a waiver under the Commission's general waiver authority is appropriate.

D. Cox's Request for Waiver

Finally, Cox calls for the Commission to grant to it a waiver to the same extent that the Commission grants one to LUS. There are two problems with this. First, Cox's argument makes no sense. Cox claims that it is already complying with the integration ban. If that is true, then it presumably does not need a waiver, and there is no factual basis for the Commission to grant one.

Second, LUS and Cox use fundamentally different technologies. LUS provides service over a fiber-to-the-home infrastructure; Cox uses hybrid fiber coax. LUS uses IPTV; Cox does not. Commercial products are readily available to enable compliance by Cox's non-IPTV system; they are not available for LUS's IPTV service. LUS is a wholly new system and service; Cox has had the Lafayette market to itself for some time. Thus, each party's situation should be judged on its own merits.

III. RESPONSE TO COMMENTS OF CONSUMER ELECTRONICS ASSOCIATION

LUS now replies to the comments filed by the Consumer Electronics Association ("CEA"). To the best of LUS's knowledge, CEA has to this point opposed virtually all requests by MVPDs for waiver of the integration ban.[15] In response to LUS's petition, CEA called for the Commission to commence a rulemaking on issues relating to IPTV and Section 1204 of the Commission's rules.

LUS does not take issue with CEA's suggestion that a rulemaking may be appropriate in this circumstance. A fresh look at the matter could well be beneficial.

[15] *See All Digital Order; Consolidated Waiver Order.*

If the Commission chooses to initiate a rulemaking, it should nevertheless treat LUS like other IPTV providers and grant it a waiver now. If the rulemaking results in new regulatory requirements or IPTV providers, then the Commission should apply them uniformly to all IPTV providers, including LUS.

IV. CONCLUSION

For the foregoing reasons, and as more fully stated in its Petition, LUS requests that the Commission grant a waiver from the obligations set forth in Section 1204(a) of the Commission's rules, applicable to LUS's IPTV service.

Respectfully submitted,

Jim Baller

Jim Baller
Casey Lide
THE BALLER HERBST LAW GROUP, P.C.
2014 P St. NW Suite 200
Washington, D.C. 20036
office: 202/833-5300
fax: 202/833-1180

June 1, 2009

Counsel for Petitioner

VERIFICATION

To the best of my knowledge, information and belief formed after reasonable inquiry, LUS's petition and these Reply Comments are well grounded in fact and are warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and it is not interposed for any Improper purpose.

Jim Baller

CERTIFICATE OF SERVICE

I, James Baller, certify that on this 1st day of June, 2009, I caused a copy of the foregoing further amended reply comments to be served by U.S. mail, postage prepaid, upon the following counsel of record.

Gary S. Lutzker
Derek Teslick
Dow Lohnes PLLC
1200 New Hampshire Avenue, NW
Washington, DC 20006

James W. Hedlund
Vice President for Regulatory Affairs
Consumer Electronics Association
1919 S. Eads St.
Arlington, VA 22202

Robert S. Schwartz
Mitchell L. Stoltz
Constantine Cannon LLC
1627 Eye Street, NW
10th Floor
Washington, DC 20006